IN THE SUPREME COURT OF FLORIDA

PATRICIA DIFFENDERFER,

Petitioner,

vs.

CASE NO. 66,221
DCA CASE NO. AV-79

RICHARD L. DIFFENDERFER,

Respondent.
_____/

RESPONDENT'S ANSWER BRIEF

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STATEMENT OF FACTS

The parties were married in 1953, and all four of their children have attained their majority. Petitioner is, and has been throughout the marriage, a licensed registered nurse (R-164), employed as such throughout the marriage (R-165). Since March of 1983, Petitioner was employed on a full-time basis as a registered nurse, and was so at the time of the final hearing, earning a gross salary of $432.80 per week (R-165, 171). Her net monthly income after federal withholding tax and social security and an approximate $150.00 per month payroll deduction to her savings is $1,636.67 (R-167). In addition, she received $180.00 per month rental income for an apartment located on the parties' Lee Avenue property (R-168). Her net disposable monthly income is therefore $1,816.67, and her net monthly living expenses are approximately $1,100.00 (R-169). By contrast, Respondent operates with a net monthly deficit of $726.47 (R-282).

Since approximately 1970, the parties had one joint checking account. There were, however, three separate checkbooks out of which money could be drawn on the joint account. The parties would deposit their respective earnings into that account each pay period. One of the three checkbooks was considered by Petitioner as exclusively hers. She would separately account for her earnings in that particular checkbook and use the funds for her personal wishes and purchases. The Husband's earnings were

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accounted for in the other two checkbooks, one of which was earmarked for the family's groceries and the other for the family's living expenses, mortgage payments, and property acquisitions (R-177-179, 185).

Petitioner, for an approximate ten-year period, preceeding the parties' separation, consumed alcoholic beverages to excess on a daily basis, often to the point of passing out and wetting the bed. Her chronic drinking problem created a very unpleasant situation for Respondent and the children, by provoking her constant arguing and even physical violence (R-193-194, 259-262, 429). The marriage had been an unhappy one for fifteen years (R-247). Petitioner was a poor housewife (R-259) and spent less time than Respondent in doing household chores such as cleaning, cooking, and tending to the children (R-262), even though he worked full time and she only part time.

Petitioner, by virtue of her marriage to the Appellee, and by utilizing her earnings throughout the marriage solely for her own personal benefit (while Respondent paid all living expenses and property acquisitions), and for other sundry reasons was able to amass a substantial cash and receivable estate for herself at the time of the final hearing. By settlement, the Wife's interest in a closely held corporation, Derferprice, Inc., was purchased (R-154) for the consideration of a note receivable and mortgage on the corporate property in the amount of $18,000.00 (R-285). She also received an undivided one-third interest in a house and

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lot located in Autumn Woods, owned jointly by the parties, and their daughter, Jan Rybak (R-155), which property was valued at $44,000.00.

Beginning in January of 1982, Petitioner began to systematically withdraw approximately $10,000.00 of joint funds from the parties' joint savings account and converted those funds to her own use without the consent or knowledge of Respondent (R-179-183, 258). Additionally, there was no evidence presented to defeat the joint ownership of that account. She closed the joint account and opened one in her sole name, purchased stocks and IRA's and generally built her cash estate to over $23,000.00. Considering the receivable from the corporation, her assets were in excess of $41,000.00 (R-179-184, 219). By contrast, the Husband's cash estate at the time of the final hearing was approximately $900.00 (R-283).

Petitioner's mother, during the course of the marriage, made a joint gift to the parties of 22 shares of Eastman Kodak Stock, which remains jointly owned by them (R-276,265).

In addition, the Wife now owns, by virtue of the final judgment, personal property acquired by the parties during the marriage in the approximate amount of $20,000.00 (R-265). By contrast, the Respondent owns the balance of the personal property acquired by the parties during the marriage valued at approximately $1,000.00 (R-266).

Although working full time at the time of final hearing, and not having complained to her husband of any medical

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problems she had in the last fifteen years of the marriage (R-282), and acknowledging that she was in good health (R-174), Petitioner now claims to be physically unfit for employment due to her varicose veins. She was last treated for varicose veins ten years ago (R-172), and no doctor has ever told her that she could not work because of varicose veins (R-171). Petitioner's family physician, Dr. Henry, in response to a request from Petitioner's lawyer, as to whether he was aware of any medical problems that would inhibit her ability to work, rendered an opinion that she was in excellent health (R-173, 233). Dr. Henry knew of no medical reason why Petitioner cannot work as a nurse on a full time basis as she is doing (R-235).

Petitioner told her psychiatrist, Dr. Royce Jackson, that she felt she was in good health, that she enjoyed her work, and things were going well. She never complained to him, of her inability to work due to any physical or emotional restraints (R-252). From his observations and treatment of Petitioner, he knows of no physical or mental problems that would prevent her from working full time as a nurse. He did opine that it would be devastating to Petitioner's self esteem, if she did not continue working as a nurse (R-253).

Dr. Pararo, who last treated her for varicose veins in 1973, did testify that Petitioner would probably not be as comfortable working five days a week, as would a person who did not have varicose veins (R-304).

Substantially, all of the funds that went into the

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acquisition, maintenance, and construction of the real property acquired by the parties during the marriage, came from the Respondent's earnings of his enterprise (R-185), while Petitioner built her a substantial cash estate (R-179-184).

The parties' marital home (Lee Avenue) was valued at $119,500.00 (R-257), with a first mortgage encumbering said property in the amount of $12,699.00 (R-257). There is also a second mortgage on the Lee Avenue property in the original principal amount of $40,000.00. The proceeds of that mortgage were used as follows: $15,000.00 went to pay on some of the Derferprice property; $5,000.00 went for joint debts of the parties; $10,000.00 was for a swimming pool placed at the Lee Avenue property; and $10,000.00 went for construction costs on Lot 64, Fiesta Drive, located on Alligator Point (R-279).

The Fiesta Drive property was purchased in the parties' joint names by Respondent, who acquired a personal signature loan for the purchase in the amount of $5,000.00 (R-191). Petitioner did not sign the note (R-277), and it was paid back wholly with Respondent's separate funds (R-277).

The Fiesta Drive property is a week-end type home. Respondent performed all the labor for its construction (R-191) on weekends, nights, and his vacation times (R-192,277). A substantial amount of the labor performed was after the parties' separation (R-276). The value of the labor was in excess of $16,000.00 (R-225), and all the materials for the construction were purchased from a construction loan in the amount of approximately $15,000.00, which was

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subsequently repaid by the corporation, Derferprice, Inc. (R-279-280), and with part of the proceeds from the second mortgage on the Lee Avenue property (R-278). There is also presently existing, an additional construction loan on the Fiesta Drive property, in the amount of $17,000.00, which also was utilized for the purchase of materials in the construction (R-280).

The trial court awarded Respondent, the Petitioner's undivided half interest in the Fiesta Drive property.

The final judgment (R 131-133) and the stipulations of the parties left them in the following financial positions with regard to the distribution of assets:

Asset	Value	Lien	Award to Wife	Award to Husband
Marital Home	$119,500.00	$12,699.00	$80,100.75	$26,700.25
Autumn Woods	44,000.00	28,000.00	5,333.33	5,333.33
Fiesta Drive	60,000.00	38,000.00 (2nd Note 17,100.00 (const. loan)	None	4,900.00
Receivable (Corp)	18,000.00	N/A	18,000.00	None
Personal Property	21,000.00	None	20,000.00	1,000.00
Joint Savings	10,000.00	N/A	5,000.00	5,000.00
Eastman Kodak	1,760.00	None	880.00	880.00
Net Equity in Derferprice, Inc. (R-285-286)	89,000.00	78,378.06	None	5,310.97
Credit Union	7,519.06	N/A	7,519.06	None
Money Market	4,690.00	N/A	4,690.00	None
IRA Account	2,000.00	N/A	2,000.00	None
Appellee's contribution to retirement*	44,000.00	N/A	None	44,000.00
	$421,469.06	$174,177.06	$143,523.14	$93,124.55

*Assuming for purposes of argument only, that Appellee's contribution to his retirement is an asset.

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On Appeal (Diffenderfer vs. Diffenderfer, 456 So.2d 1214 (Fla. 1st DCA 1984)), the District Court affirmed portions of the trial court's Judgment; reversed the trial court's failure to award permanent periodic alimony; directed the trial court to reconsider the award of rehabilitative alimony and the award of a special equity in the beach property; and certified the following two questions as being of great public importance:

I

Do Conner v. Conner, and Kuvin v. Kuvin, limit the scope of appellate review enunciated in Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980)?

II

How should a trial Judge treat a spouse's entitlement to retirement benefits in fashioning an equitable distribution of property in dissolution proceedings?

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I

Do Conner v. Conner, and Kuvin v. Kuvin, limit the scope of appellate review enunciated in Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980)?

In certifying this question, the District Court recognized that it was joining the Fourth District Court of Appeal, which had certified the identical question in Marcoux v. Marcoux, 445 So.2d 711 (Fla. 4th DCA 1984). See Diffenderfer id at 1216.

After the decision below was rendered, this Court decided Marcoux v. Marcoux, No. 65,078, 10 FLW 120, (Fla. 1985), and, in so doing, has fully answered the foregoing question.

This Court in Marcoux, and in its sister case, Walter v. Walter, No. 64,641, 10 FLW 118 (Fla. 1985), answered that question in the negative, and reiterated the standards of judicial review required by Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980).

In this case below, Judge Joanos, in his dissenting opinion, (Diffenderfer, 456 So.2d at 1218-1219), applied the Canakaris rule as to judicial review in precisely the manner required by this Court in Marcoux and Walter.

Thus applying the rule, the dissent below properly concluded that the Final Judgment in this case should not be disturbed.

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II

How should a trial Judge treat a spouse's entitlement to retirement benefits in fashioning an equitable distribution of property in dissolution proceedings?

Respondent respectfully submits that the proper answer to that question is; "The trial judge should treat a spouse's entitlement to retirement benefits in a manner which will do equity between the parties after giving due consideration to the facts in each particular case."

Retirement plans come in many forms and sizes. Some are funded completely by the beneficiary, others partly by the beneficiary and partly by the beneficiary's employer, and still others are funded totally by the employer. Some may have a readily ascertainable cash surrender value. The value of others may be subject only to speculation, based upon assumptions of fact which may or may not come to pass. For the very wealthy, a retirement plan may be a highly insignificant matter in an overall plan of property distribution and support. For those of more modest means, a retirement plan may constitute a major item for consideration by a Court in formulating a proper plan.

The disposition of the retirement benefits must of necessity, depend upon the facts of the individual case.

In the case of the young professional, not yet approaching retirement age, who has put away monies in an individual retirement account, equity might require that account to be considered the asset of that spouse, to be offset by distribution of other assets to a nonworking spouse.

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In the case of the worker, who is approaching retirement age, and whose principal (and maybe even sole) asset is his expectancy of retirement benefits, equity might demand that those benefits be considered a source of income from which support to the other spouse might be paid.

Indeed, Respondent submits that the latter certified question has in fact, already been addressed by this Court in Walter, supra, when you said:

> "While we recognize the significant responsibility of the district courts to review the reasonableness of discretionary acts of trial courts in dissolution proceedings, we must reject the establishment of new rules of law that would unduly restrict the discretionary authority of trial judges to render equitable property dispositions or support and alimony awards. See Tronconi v. Tronconi, No. 63,368 (Fla. Jan. 24, 1985). We reiterate that "[i]n considering the appropriate criteria for the award of the different types of alimony, it is important that appellate courts avoid establishing inflexible rules that make the achievement of equity between the parties difficult, if not impossible." Canakaris, 382 So.2d 1200 (emphasis added). That statement reflects our recognition that the discretionary authority granted trial judges in dissolution matters is necessary because such cases are not susceptible to fixed patterns. The unique characteristics of the instant case illustrate the reason flexibility is needed to assure equitable property dispositions and support awards."

(Emphasis in original)

Certainly in view of the diverse nature of retirement plans, and the greatly differing financial circumstances in which parties to dissolution proceedings find themselves, no new rule of law that would unduly restrict the discretionary authority of trial judges to render equitable property dispositions or support and alimony awards, should be now made concerning the disposition of retirement benefits. The

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trial judge should be permitted to treat retirement benefits in any manner which, under the circumstances of the particular case, will do equity between the parties.

As pointed out by Judge Joanas in his dissent below, the trial court in this case, treated the Husband's entitlement in a manner that did equity between the parties, and such treatment should not now be disturbed on appeal.

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CONCLUSION

As Judge Joanos said below:

"What the trial judge did in this situation did not fail to satisfy the test of reasonableness set forth above. Viewed in their totality, the various provisions of the final judgement together with the stipulations of the parties add up to an overall disposition of the assets of this marriage which are affirmable under the Canakaris standard.

The Judgement of the trial judge should be affirmed.

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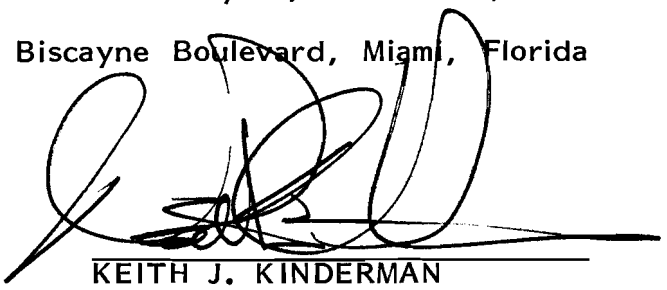
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail this 8th day of March, 1985, to CARLTON, FIELDS, WARD, EMMANUEL, SMITH & CUTLER, P.A., Attorneys for Petitioner, Post Office Drawer 190, Tallahassee, Florida 32302, and LAW OFFICES OF FRUMKES AND GREEN, P.A., Attorneys for the Florida Chapter of the American Academy of Matrimonial Lawyers, Suite 1607, New World Tower, 100 North Biscayne Boulevard, Miami, Florida 33132.



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